

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 7, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP647-CR

Cir. Ct. No. 2013CF940

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL T. GANT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: TIMOTHY A. HINKFUSS, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Michael Gant appeals a judgment convicting him of aggravated battery, resisting an officer, and obstructing an officer. He also appeals an order denying his postconviction motion for sentence modification. Gant contends the sentencing court mistakenly believed he would be eligible for

the Earned Release Program (ERP) and the Challenge Incarceration Program (CIP), and Gant's ineligibility for those programs constitutes a new factor justifying a sentence reduction.¹ Because Gant has not established by clear and convincing evidence that a new factor exists, see *State v. Harbor*, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828, we affirm the judgment and order.

¶2 At the sentencing hearing, the court imposed concurrent sentences totaling three and one-half years' initial confinement and five years' extended supervision based on the seriousness of the offenses, the need to protect the community, and Gant's rehabilitative needs. After the court imposed the sentences and the terms of Gant's extended supervision, and reminded Gant that he was prohibited from possessing a firearm, the court added, "I am making him eligible for the Challenge Incarceration Academy and—and the Earned Release Program." Because Gant was convicted of aggravated battery, he was not eligible for either of these programs. See WIS. STAT. §§ 302.045(2)(c) and 302.05(3)(a)1. (2015-16).²

¶3 Gant requested a sentence reduction based on the "new factor" that he was not eligible for the programs that could reduce his sentence. At the hearing on the postconviction motion, the circuit court explained its intent was to not stand in the way of Gant's participation in ERP or CIP, but the court knew "[i]t's not up to me ... I can block it if I so choose to, but whether you're in it or not, it's

¹ In his postconviction motion and his initial brief on appeal, Gant also argued the sentencing court improperly utilized the COMPAS assessment tool. In his reply brief, Gant concedes the Wisconsin Supreme Court's recent decision in *State v. Loomis*, 2016 WI 68, 371 Wis. 2d 235, 881 N.W.2d 749, defeats that argument.

² All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

entirely up to the Department of Corrections” The circuit court concluded Gant’s ineligibility for ERP and CIP was not a new factor for the purposes of sentence modification because the court never considered his ability to participate in those programs when it sentenced Gant. The court explained, “from my vantage point in formulating [Gant’s] sentence, whether he was in this program or not had absolutely nothing to do with the sentence in this particular regard.” The court continued, “[i]t is not a new factor because it was never a factor to begin with.”

¶4 A new factor is a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of the original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all the parties. *Harbor*, 333 Wis. 2d 53, ¶40. Whether a fact or set of facts constitutes a new factor is a question of law, subject to this court’s independent review. *State v. Hegwood*, 113 Wis. 2d 544, 546-47, 335 N.W.2d 399 (1983).

¶5 Gant’s ineligibility for ERP and CIP does not constitute a new factor because his eligibility for those programs was not a factor in the length of his sentences. The prospect of Gant’s participation in ERP or CIP was neither highly relevant to the sentence imposed nor unknown to the sentencing court. The circuit court was fully aware that Gant’s ability to participate in either program was committed to the discretion of the Department of Corrections, and the court’s intention “not to stand in the way” does not establish that eligibility for the programs was highly relevant to the court’s sentencing decision.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

